No. 96-272

In The

Supreme Court of the United States

October Term, 1996

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

When Congress has clearly stated that rights to modify Longshore and Harbor Workers' Compensation Act awards should end one year after the last payment of compensation, may a Court of Appeals order a small award "fashioned expressly" to indefinitely extend that period?

LIST OF PARTIES

The parties to the proceeding resulting in the decision sought to be reviewed are:

John Rambo

Metropolitan Stevedore Company;[1] and

Director, Office of Workers' Compensation Programs,

United States Department of Labor

[1] In accordance with Rules 14.1 and 29.1 of this Court, Metropolitan Stevedore Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Opinion of the Ninth Circuit (J.A. 81) is reported at 81 F.3d 840. The Order denying Metropolitan's Petition for Rehearing and rejecting its Suggestion for Rehearing *En Banc* (J.A. 96) is unpublished. The Opinion of the Ninth Circuit originally reversed by this Court (J.A. 62) is reported at 28 F.3d 86. The Decision and Order of the Benefits Review Board (J.A. 57) and the Administrative Law Judge's Decision and Order Granting Modification (J.A. 50) are unreported. The Opinion of this Court (J.A. 67) reversing and remanding to the Ninth Circuit is reported at 115 S.Ct. 2144.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 10, 1996. (J.A. 81) A timely Petition for Rehearing filed by Metropolitan was denied on May 22, 1996. (J.A. 96) The Petition for a Writ of Certiorari was filed on August 19, 1996 and granted on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(h) and 22 of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"), 33 U.S.C. Sections 908(h) and 922, provide in relevant part as follows:

MODIFICATION OF AWARDS

8(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * *

Sec. 22. Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact . . . , the deputy commissioner may at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

STATEMENT

Much of the factual background pertinent to the question presented was summarized within this Court's opinion in *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 115 S.Ct. 2144 (1995).

> In 1980, respondent John Rambo injured his back and leg while working as a longshore frontman for petitioner Metropolitan Stevedore Company. Rambo filed a claim with the Department of Labor that was submitted to an Administrative Law Judge. After Rambo and petitioner stipulated that Rambo sustained a 22 1/2 % permanent partial disability and a corresponding $120.24 decrease in his $534.38 weekly wage, the ALJ, pursuant to LHWCA § 8(c)(21) awarded Rambo 66 2/3 % of that figure, or $80.16 per week. . . .
>
> After the award, Rambo began attending crane school. With the new skills so acquired, he obtained longshore work as a crane operator. He also worked in his spare time as a heavy lift truck operator. Between 1985 and 1990, Rambo's average weekly wages ranged between $1,307.81 and $1,690.50, more than three times his pre-injury earnings, though his physical condition remained unchanged. In light of the increased wage-earning capacity, petitioner . . . filed an application to modify the disability award under LHWCA § 22. Petitioner asserted there had been a 'change in conditions' so that respondent was no longer 'disabled' under the Act. The ALJ agreed that an award may be modified based on changes in the employee's wage-earning capacity, even absent a change in physical condition. After discounting wage

increases due to inflation and considering petitioner's risk of job loss and other employment prospects, the ALJ concluded Rambo 'no longer has a wage-earning capacity loss' and terminated his disability payments. App. 68. The Benefits Review Board affirmed, relying on *Fleetwood v. Newport News Shipping & Dry Dock Co.*, 16 BRBS 282 (1984), aff'd, 776 F.2d 1225 (CA4 1985), which held that 'change in condition[s]' means change in wage-earning capacity, as well as change in physical condition. App. 73. A panel of the Court of Appeals for the Ninth Circuit reversed. *Rambo v. Director,* OWCP, 28 F.3d 86 (1994). Rejecting the Fourth Circuit's approach in *Fleetwood,* the Ninth Circuit held that LHWCA § 22 authorizes modification of an award only where there has been a change in the claimant's physical condition.

Rambo I, 115 S.Ct. at 2146-47 (J.A. 67-69).

This Court reversed, holding that physical change was not necessary for modification and providing the outline of the statutory scheme essential to this review of the Ninth Circuit's subsequent ruling on remand.

> Section 2(10) defines 'disability' as 'incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' 33 U.S.C. § 902(10). . . . For these non-scheduled injuries [those subject to 33 U.S.C. § 908(c)(21)], the type at issue in this case, loss of wage-earning capacity is an element of the claimant's case, for without the statutory presumption that accompanies scheduled injuries, a claimant is not 'disabled' unless he proves 'incapacity because of injury to earn the wages.' LHWCA § 2(10), 33 U.S.C.

> § 902(10). [citations omitted] These two sections make it clear that compensation, as an initial matter, is predicated on loss of wage-earning capacity, and that such compensation should continue only 'during the continuance of partial disability,' LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21), *i.e.*, during the continuance of the 'incapacity . . . to earn the wages,' LHWCA § 2(10), 33 U.S.C. § 902(10). Section 22 accommodates this statutory requirement by providing for modification of an award on the ground of 'a change in conditions.' 33 U.S.C. § 922.
>
> . . . Like most other workers' compensation schemes, the LHWCA does not compensate physical injury alone but the disability produced by that injury. [citations omitted] Disability under the LHWCA, defined in terms of wage-earning capacity, LHWCA § 2(10), is in essence an economic, not a medical concept. [citations omitted] . . . It may be ascertained for nonscheduled injuries according to the employee's actual earnings, if they 'fairly and reasonably represent his wage-earning capacity,' and if they do not, then with 'due regard to the nature of [the employee's] injury, the degree of physical impairment, his usual employment and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.' LHWCA § 8(h), 33 U.S.C. § 908(h). The fundamental purpose of the Act is to compensate employees (or their beneficiaries) for wage-earning capacity lost because of injury; where that wage-earning capacity has been reduced,

> restored, or improved, the basis for compensation changes and the statutory scheme allows for modification.

Rambo I, 115 S.Ct. at 2148 (J.A. 71).

Because Rambo had raised other arguments before the Ninth Circuit that the panel had not previously addressed, the case was remanded for further proceedings consistent with this Court's Opinion. On remand, the Ninth Circuit addressed Rambo's argument that the Board "should have modified his award to a nominal amount,"[2] reversed the orders terminating benefits, and remanded the case for entry of an award "fashioned expressly for the purpose of preserving [Rambo's] right to receive compensation should disability in an economic sense ever visit him." *Rambo II*, 81 F.3d at 845. (J.A. 89, 90, 93) Metropolitan's Request for Rehearing and Suggestion for Rehearing *En Banc* were denied. (J.A. 96)

SUMMARY OF ARGUMENT

The Ninth Circuit's award of compensation because Rambo might at some future time suffer economic harm presumes (a) that the sole purpose of the LHWCA is to

[2] The Ninth Circuit first rejected Rambo's contention that estoppel barred Metropolitan from seeking modification. Rambo has not challenged this ruling. Rambo's "nominal award" claim had not been presented to either the ALJ or the Board but was found by the court to be implicit in his defense against Metropolitan's modification effort. *Rambo v. Director, Office of Workers' Compensation Programs (Rambo II)*, 81 F.3d 840, 843 (9th Cir. 1996) (J.A. 89).

provide complete remedies for all injured workers, (b) that Congress, itself unwilling to expressly lengthen or suspend the running of a statute of limitation, has delegated that authority to judicial discretion, and (c) that a court may disregard compelling statutory terms and established canons of statutory construction whenever their application might result in hardship to an individual claimant.

Only these presumptions can support the award of compensation to a worker who no longer experiences a disability. Only these beliefs can transform doubts about the future into a present entitlement. No other contentions can possibly underlie defense of the Ninth Circuit's willful disregard of Congress' one-year limitation on modification remedies and this Court's repeated directives that the Legislature's clearly expressed judgments be enforced. Each, however, is misguided.

The LHWCA does not guarantee a complete remedy for all work-related disabilities. It is, instead, a compromise of competing interests, a *legislative* choice not subject to judicial rebalancing and revision. Courts have no license to disregard clear statutory language because they appraise the results as unwise or overly harsh. Courts *must* learn to heed this Court's repeated admonitions against the substitution of judicial perceptions of wisdom and fairness for those clearly expressed by Congress.

The "nominal award" ordered by the Ninth Circuit was a mere device, a fiction adopted for the transparent purpose of evading Congress' one-year time limitation. The lesson of *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952), must be once again taught.

> We are aware that [the LHWCA] is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all.

ARGUMENT

A. THE NOMINAL AWARD DEVICE WRECKS THE STATUTORY SCHEME, VIOLATING THE DISTINCTION BETWEEN "INJURY" AND "DISABILITY," THE ENTITLEMENT LIMIT OF § 8(c)(21), § 22'S TIME LIMITATIONS, THE NINTH CIRCUIT'S LIMITED REVIEW AUTHORITY, AND THIS COURT'S REPEATED RULINGS.

The primary synonyms for "nominal" listed in ROGET'S 21ST CENTURY THESAURUS (Dell Publishing, 1992, p. 575) include "alleged," "apparent," "in effect [or name] only," "pretended," "professed," "puppet," "purported," and "seeming." All of these adjectives accurately describe the award which the Ninth Circuit has ordered. Each illuminates what use of the term "nominal" obscures.

Rambo has been awarded compensation to which he is *not* entitled. The award was a mere device to avoid limits upon Rambo's right to seek modification, a fiction written to extend indefinitely a statutory one-year deadline. The statutory framework and history clearly demonstrate that the use of this device not only rewrites Section 22, it also violates the LHWCA's clear distinction between "injury" and "disability" and erases Section 8(c)(21)'s express limitation upon compensation entitlement.

Rambo's initial entitlement to LHWCA compensation derived from Section 8(c)(21), 33 U.S.C. Section 908(c)(21). In cases governed by that statutory subsection, a claimant is entitled to receive compensation only if he experiences a wage-earning incapacity – a statutory "disability" – and for only so long as that incapacity continues. When a worker's wage-earning capacity improves or declines following the initial award or denial of compensation, Section 22 allows for modification at any time within one year following the date of the last payment of compensation or rejection of a claim for benefits. *Rambo I, supra,* at 2148 (J.A. 72); *Potomac Electric Power Co. (PEPCO) v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268 (1980).

Whether the worker does or does not experience a wage-earning incapacity is ascertained first by reference to the worker's actual post-injury earnings. If those actual earnings are determined by the Administrative Law Judge to "fairly and reasonably represent [the worker's] wage-earning capacity," the inquiry ends and a comparison of actual pre- and post-injury earnings establishes the amount of any award. If, however, the Administrative Law Judge determines that actual earnings do *not* fairly and reasonably represent the worker's ability to earn and therefore finds that *a* "disability" exists, the LHWCA requires consideration of a variety of factors "including the effect of disability as it may naturally extend into the future" and determination of an appropriate wage-earning capacity figure. 33 U.S.C. § 908(h); *Rambo I,* at 2148 (J.A. 73).

Section 7(c) of the Administrative Procedures Act governs the proceedings and imposes the burden of proof upon the proponent of a rule or order. 5 U.S.C. § 556(d).

This burden must be met by a preponderance of the evidence. Neither clear and convincing evidence nor proof beyond a reasonable doubt is required. No rule requires that doubts be resolved in a manner favoring the claimant. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries/Maher Terminals, Inc.*, 114 S.Ct. 2251, 2257 (1994).

Review of Administrative Law Judge orders is governed by Section 21 of the LHWCA, 33 U.S.C. Section 921. Both the Board and reviewing courts are bound by the Administrative Law Judge's findings of fact if those findings are supported by substantial evidence in the record considered as a whole. Neither may make factual determinations or substitute its own inferences for those drawn by the statutory factfinder. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-78 (1947); and *Del Vecchio v. Bowers*, 296 U.S. 280, 287 (1935). "Substantial evidence" requires more than a scintilla but less than a preponderance. It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Both the Board and any reviewing court must consider the record "as a whole," including all that supports and detracts from the Administrative Law Judge's findings.[3] *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 133 (6th Cir. 1996).

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[3] No one can seriously argue that the Administrative Law Judge's determination that Rambo "no longer has a wage-earning capacity loss" (J.A. 55) is unsupported by substantial evidence. The Director has all but admitted the Ninth Circuit's error in this respect. (Federal Respondent's Brief in Opposition, p. 15) This Court itself noted that the ALJ "took care" in evaluating Rambo's new ability to earn "in an open labor market under normal employment conditions." *Rambo I*, at 2150 (J.A. 77).

In addition to providing a clear framework for entitlement and review, the LHWCA also establishes time limits upon both the right to file initial claims for benefits and the right to seek modification of denials and awards. Assuming that timely notice has been provided and reported, initial claims must be filed within one year following the "injury" or, if compensation has been voluntarily paid, one year after the date of the last payment. 33 U.S.C. § 913. Modification must be sought within one year following an initial denial of compensation or, if compensation has been awarded, one year following the last payment. 33 U.S.C. § 922. Both time limitations have been challenged throughout the LHWCA's history.

Challenges to the "initial claim" limitation contained in Section 13 have most often taken the form of a contention that the limitation should not begin to run until "disability" has commenced. This challenge was rejected by this Court in *Pillsbury, supra*, because (a) Section 13 itself established the "injury" as the limitation's commencement date and (b) "injury" and "disability" are defined differently in the Act.[4]

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[4] "Injury" is defined as an "accidental injury . . . arising out of and in the course of employment." It is the *physical* condition. 33 U.S.C. § 902(2). *See, generally, U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, at 615 (1982). "Disability," of course, is defined as the *economic* consequence of injury. 33 U.S.C. § 902(10).

> When Congress used 'disability' and 'injury' in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. Congress meant what it said when it limited recovery to one year from the date of injury, and 'injury' does not mean 'disability.'

Pillsbury, supra, 342 U.S., at 200 (1952).

Congress responded to *Pillsbury* and the continuing criticisms of Section 13's time limitation in 1972 and, again, in 1984 by (a) postponing the running of the one-year period until the date of awareness of the relationship between the "injury" and employment and (b) in cases of occupational disease, both extending the period to two years and delaying its running until awareness of the relationship among the injury, the work, *and* a resultant "disability."[5] *See, generally, Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d 20, 23-27 (4th Cir. 1991),

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[5] The Director's administrative resistance to time limitations has continued throughout the LHWCA's history. Even in cases of long-latency occupational disease – "injuries" for which the running of the period is expressly tolled until awareness of disability – the Director has long permitted "protective filing" to prevent the statute's running and has refused to refer these cases for formal hearing. *See Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 135 (5th Cir. 1994). Judicial resistance to Congress' limited filing period in cases of traumatic injury continues to take the form of equating "injury" and "disability," tolling the filing date until awareness "that the injury will impair the employee's earning power," i.e., until awareness of "disability." *See Paducah Marine, supra,* at 134, and cases cited therein.

and *Paducah Marine Ways v. Thompson*, 82 F.3d 130 (6th Cir. 1996).

The legislative history regarding Section 22's time limitation is well documented. Section 22 was first enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927. 44 Stat. 1437. As originally enacted, time limits on award modification were *very* strict. Review was permitted only *during* the term of an award.

In 1934, Congress rejected recommendations that there be an unlimited time period on modification and, instead, established a one-year time limit. 48 Stat. 807. In 1938, Congress extended modification to cases involving initial claim rejection but maintained the same one-year limitation. 52 Stat. 1167. Although once again presented with arguments that the one-year limitation could cause hardship, Congress chose to maintain that period while enacting Sections 8(h) and 8(i), 33 U.S.C. Sections 908(h) and 908(i), to (a) permit consideration of the "future consequences of disability" when initially determining the amount of entitlement and (b) authorize post-award settlement. S. Rep. No. 1988, 75th Cong., 3d Sess. 5-6 (1938). In 1983, proposals to remove the one-year limitation on modification again surfaced. Congress rejected both those proposals and the accompanying suggestion to repeal the language within Section 8(h) authorizing consideration of the future effects of disability. S. Rep. No. 98-81, 98th Cong., 1st Sess. 73 (1983); H.R. Rep. No. 98-570, 98th Cong., 1st Sess. 61 (1983).[6]

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[6] In *Rambo I*, this Court read Section 22's legislative history to suggest that Congress has remained "unwilling to extend the

From this statutory scheme and its legislative and judicial history, several fundamental propositions emerge. LHWCA compensation due in cases of "unscheduled" disability is payable only for economic harm and only during its continuance; physical impairment alone does not suffice. If substantial evidence supports an Administrative Law Judge's determination that disability does *not* exist, the possibility that economic harm may some day develop or recur is not a sufficient basis for an award; a party seeking modification need not disprove all possibilities. Congress knows full well how to alleviate the effects of time limitations when it so chooses and has *not* elected to extend Section 22's one-year limitation. When Congress said "one year," it did not mean "one year, unless a Court thinks that limitation too short." Each of these propositions was violated by the Ninth Circuit.

B. NEITHER "EXTRAORDINARY CIRCUMSTANCE" NOR PERSUASIVE PRECEDENT JUSTIFIES THE NINTH CIRCUIT'S ACTION. THE LHWCA'S REMEDIAL PURPOSES DO NOT LICENSE DISREGARD OF CONGRESS' COMPELLING LANGUAGE.

Rambo argues that the Ninth Circuit correctly divined within Section 8(h) of the Act an authorization to any reviewing court

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1-year limitations period in which a party may seek modification,. . . . " *Rambo I* at 2149 (J.A. 74). Indeed, Rambo himself argued that Section 22's finite time limitation itself created an inference that the statutory grounds for modification were intended to be narrow.

> [T]o award whatever benefits it deems appropriate if, in the Court's opinion, loss MAY at some future date materialize.

(Rambo's Brief in Opposition to Petition, p. 19; emphasis in original)

To Rambo, the Director, and the Ninth Circuit, Section 8(h) is a wild card which may be played to trump Section 22's time limitation whenever a court believes it appropriate to extend a claimant's right to modification indefinitely. They overlook the fact that their reading of Section 8(h) also trumps the statutory definition of "disability," 33 U.S.C. § 902(10), the limitation on benefit entitlement ("during the continuance of partial disability") contained within 33 U.S.C. Section 908(c)(21), the distinction between "scheduled" and "unscheduled" injuries drawn in *PEPCO, supra,* and the statutory framework outlined by this Court in *Rambo I* itself.

The Ninth Circuit did not purport to identify anything within the LHWCA's legislative history which even arguably supports the proposition that Section 8(h) was intended by Congress to authorize awards for non-existent disability. However, Rambo and the Director contend that Congress' decision in 1984 to *retain* both the existing one-year limitation in Section 22 and the "forward looking" final clause of Section 8(h) was an implicit endorsement of the "nominal award" concept.

The fact that the legislative history offers no clue about Congress' reasons for rejecting the proposed repeal of both provisions and the fact that the proposals themselves resulted from a perception that nominal awards were a problem are ignored by both Rambo and the

Director.[7] Instead, Congress' "failure" to correct a perceived problem is transformed into a tacit endorsement of the practice, implicit enactment of an unwritten *proviso* to Section 22 authorizing precisely the indefinite extension that Congress itself refused.

To Metropolitan, this single snippet of legislative history falls far short of demonstrating the "most extraordinary circumstance" needed to justify a court's refusal to enforce Congress' clear statement that modification rights end one year following the date of the last payment of compensation.

> Neither Rambo nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'

Rambo I, 115 S.Ct. 2144, 2147 (J.A. 70). *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483-84 (1992).

Unable to identify any clear legislative authorization permitting courts to override Section 22's time limitation whenever they believe it "appropriate," Rambo and the Director must and do resort to a playground justification for the Ninth Circuit's action, the argument that approvals of "nominal awards" by other Circuits justify the Ninth Circuit's departure from settled canons of statutory construction. This effort must fail. If, as Rambo and the Director argue, the other "nominal award" decisions

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[7] *See* S. Rep. No. 98-81, 98th Cong., 1st Sess., pp. 36, 38 (1983).

cannot be distinguished from this proceeding, they too must be rejected. If error was also committed by others, that is no "antidote to clear inconsistency with a statute." *Rambo I*, at 2149 (J.A. 75), citing *Brown v. Gardner*, 115 S.Ct. 552, 557 (1994).[8]

Regardless of whether the distinctions between Rambo's circumstances and the facts of *Hole, Randall, and LaFaille* are trifling or significant and, further, regardless of whether the Fourth Circuit's assessment of the nominal award issue does or does not conflict with that of the Ninth,[9] the fact remains that the Ninth Circuit has ordered entry of an award of compensation when *only* an

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[8] In some respects *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981), *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984), and *LaFaille v. Benefits Review Board*, 884 F.2d 54 (2d Cir. 1989) are distinguishable. *Hole* arose in the context of ALJ findings that post-injury earnings did *not* fairly represent earning capacity and that the claimant *did* experience some current economic harm. Opposite findings were entered in this case. *Randall* presented much more compelling facts. *LaFaille* involved a progressively worsening condition and "employer beneficence," both found not present in Rambo's case. All, however, are suspect. *Randall* acknowledged its reliance upon the "true doubt" rule later rejected by this Court in *Greenwich Collieries*. *See Randall*, 725 F.2d, at 796. Reliance upon that same rule may have been present in both *Hole* and *LaFaille*.

[9] In *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), the court was asked to grant Fleetwood a one percent permanent partial disability award because the future effects of the physical injury were uncertain. Noting that *Hole, supra*, involved a situation in which there *was* substantial evidence of economic harm, the Fourth Circuit declined the nominal award invitation because there was insufficient evidence that the degree of future harm was uncertain. *Fleetwood, supra*, at 1235, n.9.

unproven possibility of future harm exists. No support for such an award can be found within the Act, its legislative history, or this Court's past decisions.

At the core of any attempt to justify the Ninth Circuit's fabrication of a detour around Section 22's time limitation must lie the belief that a possible loss of benefits by a worker who might sometime experience disability is too harsh for a "remedial" statute, an incongruity which courts may correct by ignoring otherwise clear statutory language. This Court has already heard and rejected the identical argument. It simply is

> [N]ot correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities. Rather, like most workmen's compensation legislation, the LHWCA represents a compromise between the competing interests of disabled laborers and their employers. . . .
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> * * *
>
> As this Court has observed in the past, it is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results. [citation omitted] But if 'compelling language' produces incongruities, the federal courts may not avoid them by rewriting or ignoring that language. [citation omitted] Such compelling statutory language is present in this case. . . . The fact that it leads to seemingly unjust results in particular cases does not give judges a license to disregard it.

PEPCO, supra, at 282, 283-84.

The statutory framework demonstrates that Rambo's lack of indefinite protection from all possible future harm is no incongruity. It is, instead, the result of the balance of varied rights and responsibilities struck by Congress. The Ninth Circuit possessed no license to reweigh and rebalance what Congress has so carefully considered.

CONCLUSION

The language, history, and judicial interpretation of the LHWCA forbid the Ninth Circuit's attempt to rewrite Section 22's statute of limitations to fit its perceptions of justice. Maritime workers are not entitled to compensation when only a possibility of future harm exists. The Ninth Circuit's opinion and order on remand should be reversed.

DATED: January 10, 1997.

Respectfully submitted,

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